

STATE OF MICHIGAN  
COURT OF APPEALS

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FOX CREEK LIMITED,

Plaintiff-Cross-Appellee,

v

IRA TOWNSHIP and IRA TOWNSHIP ZONING  
BOARD OF APPEALS,

Defendants-Cross-Appellants.

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UNPUBLISHED

October 7, 2003

No. 240113

St. Clair Circuit Court

LC No. 97-003270-AZ

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Plaintiff appealed as of right an order denying its request to rezone its parcels 1, 3, and 4 in Ira Township to a higher density. Defendants cross-appealed a portion of the order that allowed plaintiff to use parcel 2 for the purposes permitted under its former zoning classification. Plaintiff's appeal was dismissed for failure to prosecute, but defendants' cross appeal was allowed to continue. We vacate that portion of the trial court's order that permits plaintiff to utilize the parcel at issue for those purposes allowed by defendant's former R-1 zoning.

This Court reviews "de novo a court's ruling on a constitutional challenge to a zoning ordinance." *Bell River Assoc v China Charter Twp*, 223 Mich App 124, 129; 565 NW2d 695 (1997), citing *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995). However, a court's factual findings are given considerable weight. *Bell River, supra* at 129, citing *A&B Enterprises v Madison Twp*, 197 Mich App 160, 162; 494 NW2d 761 (1992).

In its oral opinion delivered from the bench, the trial court recounted the sewer capacity problems that caused defendant township to rezone large areas, including plaintiff's property. The court determined that defendant township acted on a reasonable governmental interest and proceeded in a reasonable and logical fashion. The court found that the new zoning ordinance was not arbitrary, capricious or unreasonable, and was based on discernable facts and engineering recommendations. The court then went on to state:

This Court finds that the AEC zoning was reasonable and did not violate Fox Creek's substantive due process except as it relates to the ten acres of Fox Creek's property which was zoned R-1 and ran west from Church Road. That ten acres was zoned R-1 when Fox Creek purchased it. The rezoning of that ten acres of land to AEC destroyed its potential development in accordance with the lawful

intentions and rights of the Fox Creek Limited land owners. In this Court's opinion the Township should have spot zoned and allowed that ten acres to remain R-1, and I am ordering Ira Township to amend their present zoning ordinance to restore that ten acres of Fox Creek Limited touching on Church Road and proceeding west to R-1 . . .

Plaintiff's appeal was dismissed, and plaintiff has not filed a brief in the cross-appeal. Thus, the trial court's determinations regarding the constitutionality of the rezoning are not challenged on appeal. Because plaintiff did not show a vested right in the prior zoning, we conclude that the court, having determined that the rezoning was reasonable and did not otherwise violate plaintiff's due process rights, erred in determining that plaintiff's rights were violated, and the parcel should have been spot-zoned R-1, on the basis that the rezoning destroyed the parcel's "potential development in accordance with the lawful intentions and rights of the Fox Creek Limited land owners."

"No owner has a vested right in the continuance of a zoning once established. The ownership of property remains subject to the reasonable exercise of the police power." *Lamb v City of Monroe*, 358 Mich 136, 147; 99 NW2d 566 (1959). "In order for a nonconforming use of land to vest, actual construction on the site must have begun before the zoning regulation is adopted." *Bevan v Brandon Twp*, 438 Mich 385, 401; 475 NW2d 37, amended 439 Mich 1202 (1991). There is no taking where the nonconforming use of the property "rests solely within the owner's contemplation." *Id.*, quoting *Gackler Land Co v Yankee Springs Twp*, 427 Mich 562, 578; 398 NW2d 393 (1986).

We vacate that portion of the trial court's order that permits plaintiff to utilize the parcel at issue for those purposes allowed by defendant's former R-1 zoning.

/s/ Richard A. Bandstra  
/s/ Helene N. White  
/s/ Pat M. Donofrio